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No. 75-653

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

GERALD R. WEEKS, individually and as Chairman of the DuPage County Board of Commissioners, **ROBERT A. MORRIS**, individually and as Chairman of the Special Investigative Committee, and **FRANK H. BELLINGER**, individually and as Vice-Chairman of the Special Investigative Committee,

Petitioners,

vs.

JAMES CLARK, Treasurer of DuPage County, and **MICHAEL DUTTON**,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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To The Honorable Warren E. Burger, Chief Justice, and the Associate Justices of the Supreme Court:

Respondents pray that the Petition for a Writ of Certiorari be denied.

OPINIONS BELOW

The United States District Court's unpublished minute order extending a previously granted restraining order until the duly convened three-judge court hears and decides the Respondents' motion for a preliminary injunction appears in Appendix A of the Petition for a Writ of Certiorari (hereinafter "Petition").

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit dismissing Petitioners' appeal for want of jurisdiction is set forth in Appendix B of the Petition.

JURISDICTION

The jurisdictional statement is adequately set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

Whether a Court of Appeals has jurisdiction to review the validity of a temporary restraining order entered by a single District Court Judge when the notice of appeal is filed after a Three-Judge District Court has been convened.

STATUTES INVOLVED

Title 28 U.S.C. § 2284(3) and Federal Rules of Civil Procedure 65(b) and 65(e) are set forth in the Petition.

Petitioners neglected to include Title 28 U.S.C. § 2284(5) which states in relevant part:

> (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall

not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

STATEMENT OF THE CASE

Respondents filed their complaint on June 19, 1975 in the United States District Court for the Northern District of Illinois. On the same date, Respondents requested that a statutory three-judge court be convened (Appendix A, *infra*) and that the Petitioners be temporarily restrained from enforcing the challenged provisions of an Illinois state statute. Pursuant to notice, a hearing was held on June 23, 1975 at which time Respondents' motion for a temporary restraining order was granted. Respondents' motion for a preliminary injunction was filed on June 30, 1975.

Contrary to Petitioners' "Statement of the Case," the single District Court Judge did not extend the temporary restraining order "indefinitely." (Petition, p. 4). Rather, the District Court extended the temporary restraining order ". . . until such time as the three-judge court hears and decides the plaintiff's Motion for a preliminary injunction." (Petition, Appendix A, p. 2a). This order was entered on July 1 and docketed on July 3, 1975. (Id.) On July 2, 1975, the Chief Judge of the United States Court of Appeals for the Seventh Circuit designated the members of the three-judge court. The Chief Judge's designation order is included herein as Appendix B, *infra*.

On July 14, 1975, 12 days after the three-judge court was convened, Petitioners filed their notice of appeal to the Seventh Circuit challenging the order extending the temporary restraining order until the three-judge court hears and decides the motion for a preliminary injunction. (Petition, p. 4). On August 5, 1975, the Court of Appeals, pursuant to Respondents' motion, dismissed the appeal for want of jurisdiction. (Petition, Appendix B). The Court of Appeals did not reach the merits of Petitioners' claim.

Since August, 1975, Petitioners have filed motions with the three-judge court to dismiss the complaint and to dissolve the temporary restraining order. Respondents have filed a motion for partial summary judgment. Extensive briefs have been filed by all parties, and the motions are now awaiting a decision by the three-judge court.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Acted Properly In Dismissing Petitioners' Appeal For Lack Of Jurisdiction.

Contrary to Petitioners' representations, the Court of Appeals did not erroneously decide "all" of the questions set forth in the Petition. (Petition, p. 9). To the contrary, the Seventh Circuit did not reach the merits of Petitioners' appeal. The Court said nothing about the duration of a temporary restraining order in a case properly pending before a three-judge panel of the United States District Court. Instead, the Court of Appeals dismissed Petitioners' appeal for want of jurisdiction based on the authority of this Court's ruling in *Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1 (1971).

The Court of Appeals acted properly in dismissing Petitioners' appeal. Respondents' motion for a temporary restraining order and for the convening of a three-judge court was made pursuant to 28 U.S.C. § 2284. Under subparagraph (3) of Section 2284, a single District Court Judge may "... grant a temporary restraining order to prevent irreparable harm." Subparagraph (5) of Section 2284 provides that "[t]he action of a single judge shall be reviewable by the full [three-judge] court at any time before final hearing."

In the case at bar, Petitioners filed their notice of appeal to the Court of Appeals *after* the single District Court Judge had granted Respondents' application for the convening of a three-judge court and *after* the Chief Judge of the Seventh Circuit had designated the members of the three-judge court. Under the facts of this case, and under

the provisions of Section 2284, the Court of Appeals was correct in holding that review lay with the three-judge court and not with the Court of Appeals.

This Court's ruling in *Hicks, supra* states (404 U.S. at 3):

> ". . . a temporary restraining order issued pursuant to § 2284(3) is reviewable in a court of appeals to the extent that any such order is reviewable under 28 U.S.C. §§1291 and 1292(a). *However, if no such appeal is taken before the three-judge court is convened, application must be made to that court for vacation or modification of the temporary restraining order pending a final determination on the merits.*" (emphasis added.)

Consequently, *Hicks* resolved the only question that is now properly before this Court. If Petitioners believe the temporary restraining order was improperly extended, Section 2284(5) gives them the right to ask the three-judge court to modify or dissolve it.

The Seventh Circuit's opinion is not in conflict with any other Court of Appeals' decision. On facts almost identical to the case at bar, the Court of Appeals for the Fifth Circuit held that it did not have jurisdiction to review the propriety of a temporary restraining order entered by a single judge where the notice of appeal was filed after the three-judge court had been convened. *Associated Theatres, Inc.* v. *Wade*, 487 F.2d 1221 (5th Cir. 1973). In construing *Hicks, supra*, the Fifth Circuit stated (487 F.2d at 1222):

> "A three judge court is 'convened' when the Chief Judge of the Circuit designates the judges under 28 U.S.C.A. § 2284(1). [Footnote omitted.] At that time such a court is available to review any prior or sub-

sequent action by the single judge, pursuant to the authority of 28 U.S.C.A. § 2284(5):

> The action of a single judge shall be reviewable by the full court at any time before final hearing. . . ."

Since the three-judge court in the instant case was convened on July 2, 1975 and Petitioners' notice of appeal was not filed until July 14, 1975, the Court of Appeals properly dismissed the appeal for lack of jurisdiction.

II.

The Single District Court Judge Properly Continued The Temporary Restraining Order In Effect Until The Three-Judge Court Hears And Decides Respondents' Motion For A Preliminary Injunction.

The Court of Appeals dismissed Petitioners' appeal without reaching the merits of their claims and without briefs on the question of the proper duration of a temporary restraining order in a matter pending before a properly convened three-judge court. Even assuming *arguendo* that this Court grants certiorari and decides to overrule its decision in *Hicks* v. *Pleasure House, Inc., supra,* this case should be remanded to the Seventh Circuit Court of Appeals for full briefing and a ruling on the merits.

We note, however, that the District Court Judge acted in strict compliance with 28 U.S.C. 2284(3) when he continued the temporary restraining order in effect until the three-judge court hears and decides Respondents' motion for a preliminary injunction. The problems involved in convening a three-judge court make it extremely difficult for a three-judge panel to decide a preliminary injunction motion within the time restraints of Rule 65(b) of the Federal Rules of Civil Procedure. The draftsmen of the

Federal Rules anticipated this fact in Rule 65(e) which expressly states that Rule 65 does not ". . . modify . . . Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges."

Section 2284(3) gives the single District Court Judge the power to enter a temporary restraining order and continue it in force until the three-judge court hears and determines the motion for a preliminary injunction. Viewed in conjunction with F.R.C.P. 65(e), Section 2284 constitutes a legislative exception to the 10 day time limit set forth in Rule 65(b). *See Tennessee Public Service Commission* v. *United States,* 275 F. Supp. 87, 89 (W.D. Tenn. 1967); *Traffic Telephone Workers Federation of New Jersey* v. *Driscoll,* 71 F. Supp. 681, 682 (D.N.J. 1947).

Federal district courts frequently grant temporary restraining orders that are in effect until the motion for a preliminary injunction is heard and decided. *Cf., Kennan* v. *Nichol,* 326 F. Supp. 613, 615 (W.D. Wis. 1971), *aff'd,* 404 U.S. 1055 (1972); *Misurelli* v. *City of Racine,* 333 F. Supp. 735, 736 (E.D. Wis. 1971). In *Misurelli,* the single District Court Judge entered a temporary restraining order and continued it in effect for over one year until the three-judge court granted summary judgment. *Misurelli* v. *City of Racine,* 346 F. Supp. 43 (E.D. Wis. 1972) (three-judge court), *rev'd sub nom. on other grounds, City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973). In addition, the principle commentators on the federal rules have noted that temporary restraining orders may properly extend beyond 20 days when an extension is necessary in order to provide extra time for a hearing and decision on a motion for a preliminary injunction. 11 Wright & Miller, *Federal Practice and Procedure: Civil,* § 2953, p. 520; 7 *Moore's Federal Practice,* ¶65.07, p. 65-81-2, n. 11.

Respondents have acted expeditiously and in good faith. Motions have been filed by both sides and are now awaiting decision by the three-judge court. The order of the District Court Judge continuing the temporary restraining order until the three-judge court acts on Respondents' motion for a preliminary injunction is in accordance with 28 U.S.C. § 2284(3) and is not contradicted by any opinion of this or any other Court.

CONCLUSION

Respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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